Supreme Court, U.S.
FILED
DEC - 1 1993
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No. 93-741

In The

Supreme Court of the United States

October Term, 1993

THADDEUS KOSTRUBALA, M.D.,

Petitioner,

vs.

ESTATE OF CONNERS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state officials are constitutionally obligated to provide safety and security to a mental patient committed to a state hospital?

2. Whether the court of appeals correctly held that substantial evidence supported the verdict against a hospital administrator who permitted a violent mental patient the freedom to roam hospital grounds, resulting in the rape and death of the decedent?

3. Whether, despite the substantial verdict in the trial court, this Court should exercise supervisory powers and reverse the award of reasonable attorneys' fees to the plaintiffs?

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I. STATEMENT OF THE CASE

Petitioner asserts, without any reference to the record, that the decedent, Marilyn Marie Conners, was voluntarily committed to the Napa State Hospital in California. (Petition for Writ of Certiorari [hereafter "Petition"] at 3. Petitioner then argues that the decedent's right's under the Fourteenth Amendment depend on her admission status, and that voluntary patients are not entitled to constitutionally mandated safety and security.

The assertion that Marilyn Marie Conners was voluntarily admitted before her death is misleading. First, petitioner never raised a factual or legal issue concerning Conners's admission status *until after oral argument in the court of appeals*. The case had proceeded on an earlier interlocutory appeal, *Estate of Conners v. O'Conner*, 846 F.2d 1205 (9th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989), and then to trial on the theory that petitioner was subject to Fourteenth Amendment standards of conduct. After oral argument in the Ninth Circuit, petitioner belatedly attempted to argue, for the first time, that Conners had been committed voluntarily to the Napa State Hospital. Motion to File Supplemental Brief; Supplemental Brief Re: Liability.[1] However, petitioner's motion seeking leave to file a supplemental brief in the court of appeals clearly recognized that Conners's admission status had never been raised previously. As stated by petitioner in the motion:

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[1] Oral argument was held on May 11, 1993. Petitioner filed his motion to file a supplemental brief on May 21, 1993.

> As set forth more fully hereinafter, and in the supplemental brief filed herewith, it appears that to date the parties and the Court have incorrectly assumed that the rights and obligations herein were governed by a substantive due process standard under *Youngberg v. Romero*, 457 U.S. 307 (1992)[sic]

Motion to File Supplemental Brief at 1. The belated effort to raise the issue was rejected. The motion to file the supplemental brief was denied by the court of appeals.[2] Therefore, the issue that petitioner seeks to have this Court review was never raised or passed upon by any of the courts below.

Second, Conners was involuntarily admitted to Napa State Hospital because she was committed there by a court appointed conservator after being adjudicated "gravely disabled" within the meaning of California law governing involuntary treatment and placement. Cal. Welf. & Inst. Code §§ 5350-5368. To suggest that a mental patient who has been adjudged by a court to be "gravely disabled" and confined to a state mental hospital was voluntarily committed is absurd.

With respect to the causation issue, which respondent raises in his second "question presented," it is important to note that the court of appeals in fact performed a careful and conscientious review of the trial record: the court reversed the judgment against one of the defendants, Dr. Michael O'Connor, because it found an insufficient nexus to impose liability under 42 U.S.C. § 1983.

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[2] Order Denying Leave to File Supplemental Brief, August 16, 1993.

However, with regard to petitioner, Dr. Thaddeus Kostrubala, the court found substantial evidence of causation:

> The plaintiffs presented substantial evidence that Kostrubala had the ultimate responsibility for the issuance of P-cards [conferring privileges to move about the grounds] to penal code patients, and that Kostrubala was familiar with Duncan and his propensity for violence. The plaintiffs also presented evidence that, approximately two weeks before Conner's death, Kostrubala told the executive director of [Napa State Hospital] that he was surprised that Duncan had a P-card; Kostrubala further stated that he intended to "pull" the card. Moreover, plaintiffs provided expert testimony that supported their claim that Dr. Kostrubala's failure to prevent the reissuance of Duncan's P-card in March 1985 constituted such a substantial departure from accepted professional judgment that it was not based on professional judgment.

Appendix to Petition at 5.

Finally, petitioner's characterization of plaintiffs' success as "limited" (Petition at 5) is deceptive. Plaintiffs obtained, and the court of appeals upheld, a judgment for $280,785 for the death of a mental patient. This is hardly a de minimis or technical victory.

II. REASONS FOR DENYING THE WRIT

Not one of the questions presented by petitioner is appropriate for resolution by this Court. Putting aside the procedural and substantive aspects of the issues presented, the opinion of the court of appeals, upon which the issues rest, is unpublished.[3] Therefore, the opinion does not establish a precedent on any of the issues. Furthermore, because the opinion is unpublished and may not be cited as precedent, it does not produce a conflict with the published decision of any other court.

The first question presented – that is, whether on the facts of decedent's admission to the state hospital she was entitled to safe and secure treatment by state officials – is not ripe for resolution. It was not properly raised in the courts below. "[O]rdinarily, this Court does not decide questions not raised or involved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1975).

Moreover, the circumstances of the decedent's commitment to the mental hospital are virtually indistinguishable from those in *Youngberg v. Romero*, 457 U.S.

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[3] The court of appeals did resolve one issue raised on appeal by published opinion – the issue of the magistrate judge's jurisdiction to award attorneys' fees. But that issue is not raised by the Petition. *Estate of Conners v. O'Connor*, ___ F.3d ___, 1993 U.S. App. Lexis 25098 (9th Cir. Oct. 4, 1993). The remainder of the court of appeals's disposition is in unpublished form. Pursuant to Circuit Rule 36-3 "it shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel."

307, 309-10 (1982), where the Court held that substantive due process protection does apply. In that case, the plaintiff was committed to a mental institution pursuant to the applicable involuntary commitment provision of the Pennsylvania Mental Health and Mental Retardation Act upon a finding that the plaintiff was "severely retarded and unable to care for himself." In *Youngberg* this Court went on to hold that "When a person is institutionalized – and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist. . . . " 457 U.S. at 317. In this instance, Conners was in a locked unit of the state hospital; she was not free to walk away. Therefore, under *Youngberg*, as well as, *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), the limitations of Conners's liberty triggered the application of due process protections.

The second question presented – that is, whether Kostrubala was a proximate cause of Conners's death – is nothing more than a plea that this Court review the facts of the case and second guess the jury, the district court, and the court of appeals. Petitioner does not cite any rule of law produced by the court of appeals decision; he cites no conflict with other courts; and, he fails to invoke any necessity for creation of any new rule of nationwide importance. However, by exonerating defendant Michael O'Connor of any liability, the court of appeals showed that it applied a careful and critical application of principles of causation to the facts of this case.

Petitioner's third question – that is, whether the attorneys' fees awarded were proper – simply asks the Court to exercise supervisory powers. Again, no issue

worthy of nationwide resolution is presented. Essentially petitioner complains that an attorneys' fees award of $315,433 violates the principles set out in *Farrar v. Hobby*, ___ U.S. ___, 121 L.Ed. 2d 505 (1993). Petitioner points to no conflict with any other court; he points to no new unsettled issue.[4] In *Farrar* the district court awarded attorneys' fees after the plaintiff received a judgment for one dollar. In this case, plaintiffs obtained a judgment for $280,785. This is hardly de minimis. It is the sort of substantial victory that 42 U.S.C. § 1988 was intended to compensate. *See Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) ("where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee").

Accordingly, there is no issue raised by petitioner requiring resolution by this Court.

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[4] In an effort to cast respondents in a false light, petitioner states, in a footnote, that "the district court found respondents to have 'padded' their fees." (Quotation in original.) Petition at 16, n 8. Understandably, petitioner fails to cite the record for this quotation. In fact, the district court found nothing of the sort. It simply reduced the fee request by excluding certain time on the ground that it was not reasonably compensable and by reducing the hourly rates of compensation. The court of appeals found that "the record demonstrates that the district court carefully and critically evaluated the fee request, . . . " Appendix to Petition for Writ of Certiorari at 13-14.

III. CONCLUSION

The Petition should be denied.

December 1, 1993

Respectfully submitted,

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